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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

A. T. KNIGHT, G. GERALD KUNES
AND KUNES & KUNES,

Petitioners,

VERSUS

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.
AND TONEY BROTHERS BANK,

Respondents.

BRIEF OF RESPONDENT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Northern District of Georgia erred in granting summary judgment to National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

2. Whether this case merits discretionary review by the Supreme Court under the guidelines set forth in Supreme Court Rule 17.

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STATUTES AND RULES INVOLVED

1. Official Code of Georgia § 33-24-7 [Ga. Code Ann. § 56-2409] which, in its entirety provides as follows:

> (a) All statements and descriptions in any application for an insurance policy or annuity contract or in negotiations for such, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties.
>
> (b) Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:
>
> (1) Fraudulent;
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
> (3) The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided

coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

2. Federal Rule of Civil Procedure 56(b), (c) and (e) which provide as follows:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond,

summary judgment, if appropriate, shall be entered against him.

3. United States Court of Appeals for the Eleventh Circuit Rule 23(b) which provides as follows:

> (b) When a panel of judges of the court unanimously determines, after an examination of the briefs and records, that a case falls within one of the three categories of FRAP 34(a):
>
> (1) the appeal is frivolous, or
>
> (2) the dispositive issue or set of issues has been recently or authoritatively determined, or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process will not be significantly aided by oral argument,
>
> the case will be placed on the non-argument calendar for submission and decision without oral argument. If at any time before decision a judge on the nonargument panel concludes that oral argument is desired, the case will be transferred to the oral argument calendar. Except as provided in subparagraph (c) of this

rule, decision of a non-argument case must be unanimous, and no dissenting or special concurring opinion may be filed; otherwise the case is transferred to the oral argument calendar.

4. United States Court of Appeals for the Eleventh Circuit Rule 25 which provides as follows:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is not insufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict or judgment on the pleadings is supported by the record;
>
> and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

STATEMENT OF THE CASE

On February 27, 1976, the Georgia Department of Banking and Finance issued a Cease and Desist Order to Toney Brothers Bank. On March 12, 1976, petitioner Knight, who at all times relevant hereto was an officer and director of Toney Brothers Bank, acknowledged receipt of the Cease and Desist Order by letter to the Department of Banking and Finance. On March 18, 1976, Knight also notified the Hartford Accident and Indemnity Company, which had issued a blanket bankers bond to Toney Brothers Bank, of the existence of the Cease and Desist Order. Upon receiving that notice, Hartford immediately cancelled the bankers blanket bond.

On August 3, 1976, petitioner Knight, acting as President of Toney

Brothers Bank, prepared and submitted to respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") an application for Directors and Officers Legal Liability Coverage. On January 7, 1977, Knight prepared and filed a second application on an identical form with National Union. Both applications were signed by Knight personally, and each contained, as Question 14, the following: "Has this Financial Institution ever received a Cease and Desist Order from any Supervisory Authority? If so, give details." On both applications Knight responded "No." That representation was false and was known by Knight to be false as is shown by the fact that he had twice acknowledged existence of the Cease and Desist Order in writing.

National Union issued Directors and Officers Liability and Corporation Reimbursement Policy No. 304 21 61, effective December 1, 1976 to December 1, 1977, in reliance on the information contained in the application dated January 7, 1977. Toney Brothers Bank never filed any claim with National Union under that policy.

On September 26, 1977, Knight, acting as President of Toney Brothers Bank, submitted a renewal application (the "Renewal Application") on behalf of the Bank to National Union. Paragraph 9 of that application read as follows:

> It is agreed that this renewal application is a supplement to the application completed on _____ and that application together with this renewal supplement constitute the complete application that shall be the basis of the contract and will be attached to and form part of the policy.

In reliance on the representations made in the Renewal Application and the initial applications, National Union issued to Toney Brothers Bank the policy at issue in this case which is Policy No. 651 71 27 (the "Renewal Policy"), which was to have been effective from December 1, 1977 to December 1, 1978. When the Renewal Policy was issued, the Renewal Application was attached to it and the blank in paragraph 9 quoted above had been completed by insertion of "1/7/77" referring to the earlier application of January 7, 1977. The Renewal Policy was accepted by the Bank as issued, and neither petitioner Knight nor the Bank objected to the insertion of the date of the original application in paragraph 9 of the Renewal Application.

On October 18, 1978, Knight employed petitioner G. Gerald Kunes and Kunes & Kunes to represent him in defense of a lawsuit brought against Knight, National Union and another director of Toney Brothers Bank by two stockholders of the Bank. Kunes had been Knight's personal lawyer for several years, and later also represented him in defense of other lawsuits concerning his handling of Bank affairs.

On November 2, 1978, by letter from its counsel to Toney Brothers Bank, National Union notified the Bank of its decision to treat the Renewal Policy as void ab initio on the basis of material misrepresentations in the application forms signed by Knight and dated January 7, 1977, and September 26, 1977. National Union enclosed with that letter a check in the amount of $13,574.00 representing

a return of the premiums paid on both the original policy and the Renewal Policy, with interest. Tender of that check was initially refused by Toney Brothers Bank. The Bank later failed and was taken over by the Federal Deposit Insurance Corporation which subsequently, acting on behalf of the Bank as Receiver, did accept the check in return of the premiums and interest.

On October 6, 1981, the United States District Court for the Northern District of Georgia, Atlanta Division, granted respondent's motion for summary judgment. Petitioners appealed the judgment of the district court to the United States Court of Appeals for the Eleventh Circuit which assigned the case to its nonargument calendar and affirmed, without opinion, on August 20, 1982. Thereafter

petitioners filed a petition for a rehearing in the United States Court of Appeals for the Eleventh Circuit which was denied, without opinion, on October 18, 1982. Petitioners now seek a Writ of Certiorari from this Honorable Court to the United States Court of Appeals for the Eleventh Circuit.

SUMMARY OF ARGUMENT

The insurance policy in question, National Union Directors and Officers Liability and Corporation Reimbursement Policy No. 651 71 27, was issued in reliance on a material misrepresentation made in applications for insurance prepared and signed by petitioner Knight personally. Upon learning of the existence of the material misrepresentation, National Union promptly declared the policy in question void ab initio as it was entitled to do pursuant to applicable Georgia law. National Union did not at any time waive its right to declare the policy void, nor is it estopped from so doing by any reason. There is no genuine issue as to any material fact, and National Union is entitled to judgment in its favor as a matter of law. Therefore, the United

States District Court for the Northern District of Georgia, Atlanta Division, properly granted National Union's motion for summary judgment.

Secondly, it is respectfully submitted that this case is not appropriate for review on writ of certiorari pursuant to the considerations set forth in Rule 17 of this Honorable Court.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

ARGUMENT

1. THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA CORRECTLY GRANTED THE MOTION OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA FOR SUMMARY JUDGMENT.

National Union's motion for summary judgment was based primarily upon a statute which, in pertinent part, provides as follows:

> Misrepresentations, omissions, concealment of facts, and incorrect statements [in an application for insurance] shall not prevent a recovery under the policy or contract unless:
>
> (1) Fraudulent;
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
> (3) The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or

would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

Official Code of Georgia, § 33-24-7(b) [Ga. Code Ann. § 56-2409(b)][1]

***

[1]At the time when the district court granted National Union's motion for summary judgment the official codification of Georgia's statutory laws was known as Georgia Code Annotated, and all citations to Georgia statutes contained in the Order of October 6, 1981 granting that motion are to Georgia Code Annotated. Pursuant to a subsequent recodification, Georgia statutes are now properly referred to as they are codified in the Official Code of Georgia. For the convenience of the Court, citations herein to Georgia statutes will be to the Official Code of Georgia with the corresponding provisions of the Georgia Code Annotated appearing immediately thereafter in brackets.

Petitioners have never disputed that petitioner Knight's response to question 14 on the August 3, 1976 and January 7, 1977 applications was a misrepresentation. A Cease and Desist Order had been issued to Toney Brothers Bank by the Georgia Department of Banking and Finance on February 27, 1976, and was in effect when Knight filed those applications for insurance. It is also clear that Knight was aware of the existence of the Cease and Desist Order since he had acknowledged its receipt in writing to the Department of Banking and Finance and had notified Hartford Accident and Indemnity Company, which had issued a bankers blanket bond to the Bank, of the issuance of the Order. Nevertheless, in both the August 3, 1976 and January 7, 1977 applications, Knight represented to National Union that no Cease and Desist

Order had ever been issued to Toney Brothers Bank.

The district court properly found that the courts of Georgia are not reluctant to decide that misrepresentations are material as a matter of law if the evidence excludes every reasonable inference except that a misrepresentation is material. United Family Life Ins. Co. v. Shirley, 242 Ga. 235, 236, 248 S.E.2d 635 (1978); New York Life Ins. Co. v. Schneider, 155 Ga. App. 768, 770-71, 272 S.E.2d 739 (1980); Prudential Ins. Co. v. Perry, 121 Ga. App. 618, 626-27, 174 S.E.2d 570 (1970) and cases cited therein. See also Davis v. Integon Life Ins. Corp., 645 F.2d 494, 498 (5th Cir. 1981).

In support of its motion for summary judgment, National Union presented an affidavit of the underwriter

principally responsible for the consideration of Toney Brothers Banks' initial application who testified that the existence of the Cease and Desist Order "shows that Toney Brothers Bank constituted a significantly greater risk than was indicated by the January 7, 1977 application," and that National Union would not have issued the initial policy had it known about that Order. Affidavit of David Ratner dated April 27, 1981 at ¶ 7. National Union's Senior Vice President in charge of the Underwriting Department also testified by affidavit that "there is a much greater risk or hazard in insuring financial institutions and the officers and directors of financial institutions who have a history of economic and regulatory problems." Affidavit of Christopher Cavallaro dated April 29, 1981 at ¶ 3. Cavallaro

further testified that "it would be contrary to the underwriting standards applied by National Union Fire Insurance Company of Pittsburgh, Pa. to issue a directors and officers liability policy such as the policy issued to Toney Brothers Bank to a financial institution having the problems indicated in the Cease and Desist Order." Id. at ¶ 7. Furthermore, the official of Hartford Accident and Indemnity Company who made the decision to cancel the bankers blanket bond issued to Toney Brothers Bank upon receipt of notification of the issuance of the Cease and Desist Order testified on deposition that he did so because the Order "highlights a bad situation in any bank." Deposition of William Driscoll, p. 11. Finally, the Director of Bank Supervision of the Georgia Department of Banking

and Finance testified by deposition that the issuance of a Cease and Desist Order by his department is not a commonplace event, is a matter of great seriousness, and represents "the strongest and the ultimate device that a regulatory agency has in its supervision of a bank." Deposition of John B. Kline, pp. 43 and 69.

Petitioners presented no evidence whatsoever to controvert the testimony of Ratner, Cavallaro, Driscoll and Kline referenced above, and accordingly the district court properly found, as a matter of law, that the negative response to question 14 on the applications of August 3, 1976 and January 7, 1977 was a material misrepresentation.

The district court also properly found that, even taking as true Knight's allegation that he did not insert the date "1/7/77" in the blank provided in

paragraph 9 of the Renewal Application, petitioners cannot benefit thereby for two separate and independent reasons. First, by signing the Renewal Application, Knight agreed on behalf of the Bank that some application completed at some earlier time would constitute part of the Renewal Application and would form a part of the Renewal Policy. The applications dated August 3, 1976 and January 7, 1977 were the only other applications ever filed with National Union by the Bank, and those applications contain identical material misrepresentations. Accordingly, Knight knew when he filed the Renewal Application that National Union was relying on one or both of those previous applications, complete with material misrepresentations, in issuing the Renewal Policy.

Secondly, the evidence is undisputed that when the Renewal Policy was issued, a copy of the Renewal Application was attached to it and the date "1/7/77" had been inserted in the blank in paragraph 9 thereof. Neither Knight nor Toney Brothers Bank, however, ever objected to that fact. Under Georgia law an insured has a duty to examine the insurance contract and renegotiate the unacceptable terms because the insured will be bound by the terms of the contract. Barnes v. Mangham, 153 Ga. App. 540, 265 S.E.2d 867 (1980); Georgia Mutual Ins. Co. v. Meadors, 138 Ga. App. 486, 487, 226 S.E.2d 318 (1976); Parris & Son, Inc. v. Campbell, 128 Ga. App. 165, 173-74, 196 S.E.2d 334 (1973).

The district court also properly found the various arguments raised by

petitioners regarding waiver and estoppel to be without merit, even when all factual allegations are construed in the light most favorable to petitioners. Under Georgia law it is clear that an insurer will be estopped from denying coverage only where the insurer, with knowledge of a ground of noncoverage, assumes and conducts the defense of an action brought against the insured. Jones v. Georgia Casualty & Surety Co., 89 Ga. App. 181, 185-86, 78 S.E.2d 861 (1953); Richmond v. Georgia Farm Bureau Mutual Ins. Co., 140 Ga. App. 215, 217, 231 S.E.2d 245 (1976); Gant v. State Farm Mutual Automobile Ins. Co., 109 Ga. App. 41, 43, 134 S.E.2d 886 (1964); State Farm Mutual Automobile Ins. Co. v. Anderson, 104 Ga. App. 815, 818, 123 S.E.2d 191 (1961). The evidence at bar is clear

that National Union never assumed nor conducted the defense of petitioner Knight, and thus, even if the allegations of Knight regarding National Union's consenting to his employment of Kunes as defense counsel are true, National Union is not estopped from denying coverage. Furthermore, petitioners did not present any evidence to suggest that the defense of Knight was in any way affected by National Union's alleged authorization to him to employ Kunes as defense counsel or the alleged withdrawal of that authorization two weeks later. Finally, under Georgia law it is clear that estoppel cannot be used to create coverage where none ever existed. McGhee v. Independent Life and Accident Ins. Co., 146 Ga. App. 310, 311, 246 S.E.2d 349 (1978); Ballinger v. C&S Bank, 139 Ga. App. 686, 689, 229 S.E.2d 498, 501 (1976); Keaten

v. Paul Revere Life Ins. Co., 648 F.2d 299, 304 (5th Cir. 1981) and cases cited therein.

It is undisputed that Knight completed and filed both the August 1976 and January 1977 applications after issuance of the Cease and Desist Order to Toney Brothers Bank and after he had twice acknowledged its existence in writing. That he well understood its importance is proven by the fact that Hartford Accident and Indemnity Company cancelled its bankers blanket bond to Toney Brothers Bank immediately after receiving notice of that Order. Thus petitioner Knight, personally, knowingly and falsely represented that no Cease and Desist Order had issued against Toney Brothers Bank. That misrepresentation was material and fraudulent.

The policy issued on the basis of that misrepresentation and the Renewal Policy which incorporated the application containing that misrepresentation were thus void ab initio under Georgia law, and the district court was correct in granting plaintiff's motion for summary judgment.

2. THIS CASE DOES NOT MERIT DISCRETIONARY REVIEW BY THE SUPREME COURT UNDER THE GUIDELINES SET FORTH IN SUPREME COURT RULE 17.

This case involves a dispute between an insurer and an insured regarding whether coverage is provided under a certain policy of insurance. No federal question is involved. Furthermore, the facts and law so clearly demand judgment in favor of National Union that not only did the United States

District Court for the Northern District of Georgia grant National Union's motion for summary judgment, but the United States Court of Appeals for the Eleventh Circuit placed the case on its non-argument calendar pursuant to Rule 23 of that Court, even though petitioners requested oral argument. Pursuant to Eleventh Circuit Rule 23, placement on the non-argument calendar indicates that a panel of judges of that Court unanimously determined, after an examination of the briefs and record, either that the case was frivolous, the dispositive issue or set of issues had been recently or authoritatively determined, or that the facts and legal arguments were adequately presented in the briefs and record and that the decisional process would not be

significantly aided by oral argument. Furthermore, the Eleventh Circuit affirmed the summary judgment without opinion, pursuant to Rule 25 of that Court, indicating that the summary judgment was found to be supported by the record and that the Court determined that no error of law appears and an opinion would have had no precedential value.

Supreme Court Rule 17 sets forth certain considerations which govern review on certiorari and which make it clear that such review is not a matter of right, but of sound judicial discretion which will be granted only when there are special and important reasons therefor. Respondent respectfully submits that, since there is no federal question involved in this case and petitioners have not demonstrated

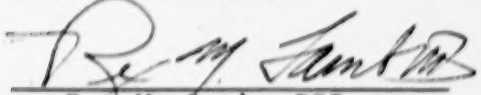
any special or important reasons why the writ of certiorari should be granted, this case is not appropriate for review by this Honorable Court.

CONCLUSION

For the reasons set forth herein, respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD



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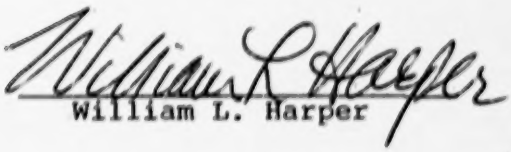

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